

Improving the Objectivity of Economic Expert Testimony for Personal Injury/Wrongful Death Litigation

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Introduction

The primary role of economic experts in personal injury and wrongful death litigation is one of determining the amount of economic damages that have resulted from some kind of harm. All trials in which damages are awarded consist of two parts: (1) a determination that liability exists on the part of the defendant to make restitution to the plaintiff, and (2) a determination of the amount of damages that will accomplish that restitution. Although economic experts do become involved in some types of liability determination, the primary social impact of testimony by economic experts is in the area of valuation of damages. The costs of litigation depend almost as much on proof of damages as on proof of liability. Damage awards represent the final payoff for bringing litigation. A proof of liability is meaningless unless the amount of demonstrated damages (and the existence of assets or insurance coverage sufficient to pay those

*Thomas R. Ireland, Professor of Economics, University of Missouri, St. Louis, Missouri

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damages) is large enough to warrant the expenses for proving that liability.

Relatively little consideration has been paid to the unique role played by economic experts in personal injury damage calculations. To address that problem, an analysis of the role played by economic experts in personal injury and wrongful death damage assessments is provided in this paper. The two-part legal framework within which economic experts must operate is then considered. One part of that legal framework relates to how economic experts in damage analysis fit into the language of Rule 702 of the Federal Rules of Evidence that determines the admissibility of expert testimony. The second part involves the unique and precise legal restrictions placed on an economic damage analysis. Economic damage calculation is the only area of expertise for which the United States Supreme Court has specifically laid out a framework for analysis. This was done in *Jones & Laughlin Steel Corp. v. Pfeiffer* (1983). In other jurisdictions, both legislation and case law, varying considerably by legal venue, impose many legal limitations on how proffered expertise must be developed and presented in courts of law.

The problem of plaintiff-defense orientation in economic damage reports is then considered in this paper. Changes that may improve the reliability of methods used by economic experts and the qualifications required before economic experts can be admitted to testify in courts of law are a separate issue from the problem of economic experts who are predisposed to favor plaintiffs or defendants in personal injury and wrongful death litigation. Some economic experts testify almost exclusively for plaintiffs and other economic experts testify almost exclusively for defendants. The opinions of such experts may be sincerely held but still reflect a consistent lack of neutrality. Since economic experts are hired more frequently by plaintiffs in personal injury and wrongful death litigation, there is some tendency for the body of all economic experts to be somewhat plaintiff oriented. This is much less true in other areas of damage analysis by economic experts, where defendants hire as many experts as do plaintiffs.

Finally, reforms in legal procedure at the federal level that could dramatically improve the quality of the economic damage testimony that is presented in courts at all jurisdictional levels is considered in this paper. Minor modifications in Rule 26 of the Federal Rules of Civil Procedure and/or small changes in legal practice that could significantly improve the objectivity and neutrality of testimony by

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Admissibility of Economic Testimony under Rule 702 of the Federal Rules of Evidence

At the federal level, the most important decision concerning the admissibility of expert testimony is *Daubert vs. Merrell Dow* (1993). *Daubert* enumerated the four following tests for the admissibility of "scientific expert testimony" under Rule 702⁴ of the Federal Rules of Evidence:

1. Whether the theory or technique employed is generally accepted in the scientific community.
2. Whether the theory has been subjected to peer review and publication.
3. Whether the theory can be and has been tested.
4. Whether the known or potential rate of error is acceptable.

Daubert was concerned with analysis of the causation of harms, but not with the value of the harms themselves. The existence of the birth defects alleged to have been caused by the drug Bendectin were not at issue in *Daubert*. The question was whether Bendectin caused birth defects. If an economic expert had performed a damage analysis in *Daubert*, the analysis would have focused on the extra costs to parents occasioned by the birth defects and the loss of earning capacity of the children born with birth defects. The resulting damage analysis would have been the same whether Bendectin caused the birth defects or the birth defects simply reflected normally expected random outcomes. As a result, only the first of the four tests in *Daubert* can easily apply to damage analysis by an economist. The theory and technique that is used in damage analysis is generally, indeed universally, accepted in the scientific community.

But the theory and technique is axiomatic in character, meaning that it is never subject to peer review since it is taken for granted. Publications discuss how the theory and technique is used, but do not discuss its legitimacy. The theory can be tested, but only in the sense that axiomatic truths can be tested. There is no known error rate since the errors can only occur if mathematical mistakes in calculation are made. Further, knowing how often mathematical mistakes might be made by a group of economic experts would not provide information that would be useful to a court in a current instance. Mathematical mistakes by an economic expert on one side of a case can easily be discovered and revealed to the court if adequate disclosure of all assumptions by economic experts on both sides takes place.

Ultimately, *Daubert* is a decision that relates primarily to decisions about liability but is much harder to apply to proffered expertise that relates to damages. Damage experts may include medical doctors, vocational experts, psychologists, life care planners, business valuation experts as well as those having other areas of expertise. In each case, the role of the expert is to examine the nature and costs of a harm, rather than to determine the source of the harm, though the two types of determination may in some cases be concurrent. In a pure damage context, regardless of what may have initially caused a person's medical condition, medical doctors may testify about the prognosis for further deterioration or improvement in the person's condition. Psychologists may provide testimony about the impact of an injury on an individual's lifestyle regardless of who was responsible for that injury. Vocational experts may testify about the potential for an individual with a given set of educational characteristics, aptitude test scores, and physical limitations to gain employment in the labor market and at what rates. This evaluation would not depend on what may have caused the physical limitations. Likewise, life-care planning experts may testify as to the costs of treatments recommended for life care and rehabilitation of an injured person, regardless of the cause of the injury requiring treatments. Special experts might testify about market conditions that a given business will face in trying to recover from an alleged contract violation, and so forth.

However, economic experts are different from other damage experts in four key respects. First, most other damage experts evaluate impacts only on a post-harm basis, whereas economic experts must consider what would have happened both before a harm has occurred and after a harm has occurred. Second, economic experts play the role of combining the impacts assessed by all other damage experts into bottom-line assessments of loss. Third, economic experts develop bottom-line estimates by employing techniques of calculation that are general to all damage analysis and which can be systematically checked for accuracy, whereas other types of damage experts provide testimony that is typically more subjective and much less easy to check. Finally, damage analysis by an economic expert is constrained by legal limitations that have enormous significance in terms of the amounts of damages that will be testified to by such an expert, whereas other types of expertise are constrained only by general issues of reliability, relevance, and scientific accuracy that would apply to any type of expert analysis.

Economics is commonly thought of as a science, but three of the

four tests for admissibility of scientific evidence enumerated in the landmark *Daubert* decision cannot be directly applied to damage analysis of the sort that is provided by economic experts.⁵ A damage analysis is the working out of a set of hypothetical results based on currently untestable assumptions about what may happen in the future, but it must be done in a way that is consistent with the theory of economics. In that sense, economic damage analysis is scientific in one sense and not scientific in another. Because other economic experts could easily check the calculations made by an economic expert if they used the same set of assumptions, one can describe this working of hypothetical results as technical in the sense of Rule 702. However, most technical expertise inherently involves the making of subjective judgements based on practical experience.

Most other types of damage analysis involve subjective interpretations of existing knowledge, as in the case of a medical doctor's opinion about the prognosis for a patient's improvement. Economic expertise is based on an axiomatically true core theory of the time value of dollar sums and mathematical calculations leading to an expert economic opinion that can be checked for accuracy, unlike most other types of technical expertise. Thus, one could also argue that economic damage analysis belongs in the "other" category of Rule 702.

The *Daubert* decision was strongly reaffirmed by *General Electric v. Joiner* (1997) and again in *Kumho Tire Co. v. Carmichael* (1999). *Joiner* and *Kumho* both reemphasized that trial court judges should function as active gatekeepers in admitting expert testimony and that the United States Supreme Court would strongly support discretionary decisions by trial court judges. *Kumho* ruled that *Daubert* applied to all types of expert testimony, but also strongly emphasized that trial court judges may use a "flexible" standard such that none of the *Daubert* tests might actually apply in a given instance of proffered expert testimony. The real meaning and importance of *Kumho* may be its emphasis on "reliability" of proffered testimony. The Court said: "We also conclude that a trial court may consider one or more of specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the court stated in *Daubert*, the test of reliability is 'flexible', and *Daubert*'s list of specific factors neither necessarily or exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination." Pending

proposals for changes in the Federal Rules of Civil Procedure and the Federal Rules of Evidence are contained in the *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence*,⁶ which also focus on reliability. Scrutiny of qualifications of economic damage experts is likely to increase. These changes are likely to have positive impacts on the quality of economic testimony but do not directly address the issue of reducing bias in the reports of economic experts, particularly bias of a sort that is sincerely held and believed by the experts involved. Several specific suggestions for that purpose are offered in this paper, but any suggestion for improving economic testimony must take into account the special role of legal requirements on economic testimony.

The Structure of an Economic Damage Analysis under *Pfeifer* and Other Legal Rules

Separately from the types of concerns that were addressed by *Daubert*, *Joiner*, and *Kumho* and proposed changes in the Federal Rules of Civil Procedure and the Federal Rules of Evidence, economic damage analysis is also subject to a variety of legal restrictions that profoundly affect the scientific merit of damage calculations. The State of Michigan requires that future damages be reduced to present value at 5% simple interest. The States of Pennsylvania and New York both prohibit discounting to present value. Florida, Washington and a number of other states allow parents of a minor child to claim lost accumulations to the child's estate in spite of the fact that their normal life expectancies would have ended long before the end of the child's normal life expectancy, when the estates would have become available. Almost all states prohibit the introduction of pre-trial interest in calculations of past damages, and so forth. In no other area of expert testimony are similar restraints placed on the development of an expert's testimonial analysis. This places an economic expert in the position of requiring a great deal of legal instruction into how a damage analysis must be prepared in each different legal jurisdiction. Further, many of these legal rules that economic experts are expected to follow violate the scientific or technical requirements of economic science. In other words, an economic expert is required by legal requirements to make certain types of errors in his or her calculations. The true nature of a damage calculation under such circumstances is a calculation that uses the standards of economic science and practice except where legally required to do otherwise. To the extent that the

Daubert standards of testing do apply to an economic damage analysis, the primary response of an expert would have to be that legal requirements prohibited the expert from arriving at truly scientific or technically accurate opinions.

At best, an economic expert's opinions can only be accurate and reliable within the bounds allowed by law. However, even the law itself may be uncertain in its application to the case at hand. Different attorneys in the same jurisdictions might give their economic experts different legal instructions, which said experts must accept based on the superior legal expertise of an employing attorney. Thus, the relevance and the reliability of all calculations must be judged within the constraints of the legal instruction under which the economic expert prepared his damage analysis, instruction which can vary even within the same legal jurisdiction.

Fortunately from the standpoint of economic experts, one federal case, *Jones & Laughlin Steel Corp. v. Pfeifer* (1983) provides a great deal of the legal structure under which personal injury and, by implication, wrongful death damage analysis must proceed. This important case contains a passage of immense judicial wisdom. Justice Stevens, speaking for the Supreme Court said:

The litigants and the *amici* in this case urge us to select one of the many rules that have been proposed and establish it for all time as the exclusive method in all federal trials for calculating an award of lost earnings in an inflationary economy. We are not persuaded, however, that such an approach is warranted. . . . For our review of the foregoing cases leads us to draw three conclusions. First, by its very nature the calculation of an award for damages must be a rough approximation. Because the lost stream can never be predicted with complete confidence, any lump sum represents only a "rough and ready" effort to put the plaintiff in the position he would have been in had he not been injured. Second, sustained price inflation can make the award substantially less precise. Inflation's current magnitude and unpredictability create a substantial risk that the damages award will prove to have little relation to the lost wages it purports to replace. Third, the question of lost earnings can arise in many different contexts. In some sectors of the economy, it is far easier to assemble evidence of an individual's most likely career path than in others.

These conclusions all counsel hesitation. Having surveyed the multitude of opinions available, we will do no more than is necessary to resolve the case before us. . . . Congress has provided generally for an award of damages but has not given specific guidance regarding how they are to be calculated. Within that narrow context, we shall define the

general boundaries within which a particular award will be considered legally acceptable (*Pfeifer* 1983 at 2555).

The *Pfeifer* decision proceeds to consider all of the elements that must be considered in projection of the present value of the lost past and future earnings that result from a personal injury. The Court establishes, in the case of *below market* discount rates, ranges within which the Court will have a lower standard of scrutiny but carefully does not prohibit values outside the range upon showing of reliable proof. The decision allows economic damage reports to be developed in actual market value terms or in *below market* discount terms, but expresses a preference for the *below market approach*. It reiterates an earlier Supreme Court requirement that income taxes should be deducted from lost earnings (but does not indicate clearly whether Social Security and Medicare payroll taxes are income taxes).⁷ Finally, the decision goes through the steps that an expert should follow to prepare a report of damages.

Ultimately, it remains to be seen how much the application of *Daubert*, *Joiner* or *Kumho* or proposed changes in Rule 702 will apply to economic damage analysis in light of *Pfeifer* and other legal restrictions that apply to damage analysis. Certainly, being able to claim compliance with the law is an ultimate defense against unscientific or technically incorrect calculations. However, it is not likely that *Pfeifer* will constitute an all purpose "pass" for economic testimony at the federal level. While economic damage experts will probably continue to have more latitude in developing assumptions than other types of "scientific" or "technical" experts, the reliability and relevance of data used in developing reports will become more and more likely to be scrutinized as the *Daubert* era continues to unfold. Moreover, the qualifications of economic experts themselves are also likely to be more closely scrutinized before testimony is admitted.

The Problem of Plaintiff or Defense Oriented PI/WD Damage Analysis

There are unethical experts in all areas of litigation. These are experts who can be hired to say whatever an attorney wants to have said under the umbrella of a claimed expert opinion. Though a serious problem in a few other areas, this is an even bigger problem in the area

of economic expertise where there may be economic experts who have opinions that are oriented in favor of larger calculations of damages than would be found by fully neutral experts. This predominance is based on a market condition that is not found in other types of litigation, such as business damage analysis or commercial damages calculations.

The problem in the area of personal injury and wrongful death analysis is that there are many more opportunities for economic experts to testify on behalf of plaintiffs than for defendants. In many other areas of damage analysis, opportunities to testify for plaintiffs and defendants are more equal and experts, as a whole, do not seem to be oriented toward opinions that favor either plaintiffs or defendants. However, even in those other areas, the best market test of an economic expert's objectivity and neutrality is a reasonable balance in the expert's testimonies between plaintiffs and defendants.

Reliable data about the number of available opportunities for an expert to be employed by plaintiff attorneys and defense attorneys do not exist. However, defense attorneys are often hesitant to employ economic experts as testimonial experts for fear of placing a bottom line on damages.⁸ Thus, the number of opportunities to testify, whether at deposition or at trial, will be greater on the plaintiff side than on the defense side in personal injury/wrongful death litigation. It is important to recognize, however, that economic experts are often hired as purely consulting experts to assist in the development of questions for the economic expert retained by plaintiffs so that some economic experts will have more experience working for defendants than will be obvious from looking at a Rule 26 list of testimonies. The same is not as true in instances of business valuation and commercial damage calculations, where both plaintiff and defense attorneys are likely to retain and proffer their own experts in testimonial roles. For this reason, even an economic expert whose testimonies are 15 to 20 percent for defendants in the personal injury/wrongful death area may be demonstrating reasonable balance.

Attorneys will tend to want to hire experts with an orientation that favors their clients. Thus, plaintiff attorneys will tend to favor economic experts whose opinions lead to more liberal estimates of economic damages, while defense attorneys will tend to favor economic experts whose opinions lead to more conservative estimates of economic damages. Other experts with very conservative methods will be employed almost exclusively by attorneys representing defendants. Experts with more neutral and objective opinions will be

more likely to have reasonable numbers of employments for both defendants and plaintiffs. Experts with balance between plaintiff employments and defense employments will not produce results as favorable for their sides as plaintiff-oriented economic experts and defense oriented experts, but they tend to have more credibility with the other side of the bar and with juries. This means that they produce estimates that may be less favorable but which are more credible.

This is only true, however, to the extent that attorneys are able to demonstrate that their experts have reasonable plaintiff-defense balance in their testimonies. The suggestions for reform that are offered below are designed to facilitate the roles of attorneys in taking advantage of the greater credibility inherent in balance between testimonies for plaintiffs and testimonies for defendants.

Proposals for Improving the Quality of Economic Expert Testimony

Because economic testimony on damages is so central to the costs of litigation, it is critical from a social perspective that such testimony be both neutral and objective in the methods that are used for calculation. Broader issues for improving economic testimony have been addressed by Richard Posner, by Ward and Thornton, and by Mandel in a 1999 Symposium on "Economists as Expert Witnesses" in the *Journal of Economic Perspectives*. The focus of this paper is on small changes in procedures already in place that would reduce the costs to attorneys of developing evidence to show the objectivity of economic experts.

In the area of damage analysis, the best potential test for the objectivity of an expert is the demonstration by an economic expert of substantial *testimonial* work on both sides of the bar.⁹ In effect, this is a true market test for objectivity. If an expert's methods are very biased toward plaintiffs, the defense bar will not hire that expert as a testimonial expert, and vice versa.

What is critical for this market test to work, however, is that experts on both sides of the bar have the necessary information to check the work of an expert when that expert was working on the opposite side of the bar in previous cases. Since attorneys are sensitive to evidence that an expert predominantly works for one side or the other, experts are regularly asked about the plaintiff-defense distribution of their work. However, since experts are not required to maintain records of the plaintiff-defense distribution of their work,

experts are free to claim percentages that make them look more neutral and objective than they actually are. Experts who might not have worked in a defense case in ten years might, for example, claim that 15% of their work is for defendants. Since unnamed involvements are privileged information, such claims cannot be checked. What can be checked, however, is the plaintiff-defense distribution of testimonial cases because experts in federal cases are now required under Rule 26 of the Federal Rules of Civil Procedure to maintain lists of all testimonies at deposition or at trial.

Unfortunately, the rule change that required experts to maintain lists of testimonies did not require that the list indicate whether the testimonies were for the plaintiff or defense. While an attorney could theoretically hire someone to go through a case list to obtain case records and review those records for plaintiff or defense involvement, doing so in any one case would be an expensive and cumbersome proposition. If experts were required to maintain records on that basis, attorneys could determine plaintiff-defense percentages very easily and could also limit themselves to obtaining a reasonable sample of the expert's cases on the opposite side of the bar. This suggested change in Rule 26 would, by itself, make significant improvements because attorneys would have incentives to take advantage of the better information that would be provided at lower cost. A closely related and perhaps quicker to implement change would be for judges to include, as part of their standing orders for expert disclosure, a requirement that experts list cases for defendants and cases for plaintiffs. This would have the same impact as changing Rule 26, which seems unlikely to occur for the next several years.

Still another small, but effective, reform would be for judges to take judicial notice of the fact that balance between plaintiffs and defendants speaks to the objectivity of an economic expert. This author is not aware of judicial rulings that considered plaintiff-defense distribution as a consideration, but such a criterion is quite consistent with other extensions of the *Daubert* criteria that exist in the record. In the 1995 rehearing in *Daubert v. Merrell Dow*,¹⁰ the U.S. Court of Appeals for the Ninth Circuit held that another criterion for admissibility of proffered testimony would be whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." Likewise, in *Sheehan v. Daily Racing Form, Inc.* (1997) and *Braun v. Lorillard Inc.* (1996) the U. S. Court of Appeals for the

Seventh Circuit considered whether an expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting" (in *Sheehan*) and that an expert "adheres to the same standards of intellectual rigor that are demanded in his professional activities" (in *Braun*).

In these cases, the work of an expert in nonlitigative contexts becomes a standard for the qualities that should apply in his work as an expert. If that standard is relevant, it would seem only a minor extension to argue that the qualities of the expert's methods and assumptions should be the same when the expert testified for defense as for plaintiff. It also seems reasonable to be able to infer from evidence in the form of a Rule 26 list that the expert is employed a significant percentage of the expert's time by both sides of the bar, using the same methods when working for each side, that the methods themselves are judged as both objective and fair by both sides of the bar. Changing Rule 26 to require the plaintiff or defense designation for each testimony, however, might be sufficient in itself. Attorneys would have incentives to make the argument that a balance between sides of the bar is a reasonable indication of objectivity and neutrality on the part of experts they have employed. At some point, judicial notice would be made of the reasonableness of that argument.

Economic experts derive their expertise from an understanding of the role of markets. Markets work best when information is readily available and is produced by the persons in a position to produce that information at least cost. Simply requiring that economic experts list their testimonies as being for plaintiffs or for defendants would be a very small change in Rule 26, but it could significantly improve the ability of attorneys, acting in the interests of their clients, to detect an orientation in favor of the opposite side of the bar.

Juries could then be provided with that information in a way that should improve the objectivity of the damage-valuation process. A jury that knew, for example, that the economic expert for the plaintiff testified for plaintiffs 100% of the time over the past four years while the economic expert for the defense testified 60% of the time for plaintiffs and 40% of the time for defendants might think that the defendant's expert was more credible. Likewise, a jury that knew that the plaintiff's economic expert testified 30% of the time for defendants, while the defense's economic expert testified 90% of the time for defendants might conclude that the plaintiff's expert were more credible. However, that could only happen if it were cost effective for attorneys to prove those percentages to the satisfaction

of judges and juries, which would be the purpose of adding "side of case" listings to the requirements of the Rule 26 list of testimonies that are already required under the Federal Rules of Civil Procedure. These minor changes could lead to significant improvements in the objectivity of economic testimony.

Suggestions for Practicing Forensic Economic Experts

The perspective of this paper has been changes that would improve the objectivity of economic expert testimony from the standpoint of the legal system. Those changes would be detrimental to experts whose practices are overwhelmingly biased in favor of defendants or plaintiffs. For those experts, the handwriting is already on the wall. Whether or not the changes recommended in this paper are adopted, experts will increasingly face scrutiny of their methods and the biases that may be inherent in those methods. The process will be slow. A large percentage of all employments of economic experts settle long before depositions and certainly before trial. Some attorneys will continue to hire experts whose reports will predictably favor plaintiffs or defendants for purposes of settlement negotiations. For those attorneys, economic experts with high or low numbers may serve the purpose of providing beginning points in a bargaining range over settlement amounts. This may be a winning strategy, particularly for plaintiff attorneys. The worst case scenario is that it motivates the defense to retain a qualified economic expert. At trial, the defense expert's testimony, if neutral and objective, may be taken over by the plaintiff attorney for his own damage estimates.

However, as the emphasis on reliability and accuracy of expert testimony continues to filter down through state court systems, this strategy will begin to put attorneys who use biased economic experts into a worse and worse light. The strategy will remain effective for cases that are settled, but judges are likely to become increasingly aware of inappropriate uses of expert testimony to set bargaining ranges for settlement negotiations. In the long run, this practice will become less and less common. As J. M. Keynes famously said, however, "In the long run, we are all dead." These fundamental changes may not happen within the work-life expectancies of most currently practicing forensic economic experts. Still, it behooves every forensic economic expert to ask how neutral an expert can be if his or her practice is almost universally on one side or the other of the bar. Others will be increasingly asking this same question.

Conclusions

The legal environment within which economic experts present testimony is changing in a way that is likely to increase objectivity and neutrality of economic experts. *Daubert*, *Joiner* and *Kumho* have set a stage in which judges will increasingly scrutinize expert testimony of all sorts. *Pfeifer* may give economic experts more flexibility than other experts may have. Justice Stevens' comments in *Pfeifer* about the approximate nature of any damage projection will give judges pause before ruling that a given discount rate or a given growth rate is not the "scientifically most accurate" discount rate or growth rate or net discount rate that an economic expert might have used. However, data that might have been accepted in the past without question will be scrutinized and an expert's own record for testimony will increasingly come into play as part of the examination of that expert's credentials. In this paper it has been suggested that small changes in Rule 26 or in the standing orders of judges requiring economic experts (and other damage experts) to provide identification of cases testified to for plaintiffs and for defendants would provide a cost efficient way for attorneys to promote objectivity and neutrality. However, whether or not those changes are made, it is almost certain that the future will involve more scrutiny of the reliability and accuracy of economic testimony. For conscientious forensic economists, that is good news indeed.

Endnotes

1. The issue of the admissibility of hedonic damages is a notable exception to this statement. "Hedonic Damages" is a term that was applied to estimates by an economist of the "lost enjoyment of life" of Ronald Sherrod and "loss of society" of Ronald Sherrod to his parents in *Sherrod v. Berry* (1988). This was an element of damages that had not been the subject of expert testimony by economists before *Sherrod*. Whether economists have any ability to measure such losses has been a subject of continuing controversy, with the courts generally ruling that the testimony does not meet the scientific requirements of Rule 702. Most economic experts, even plaintiff oriented experts, have avoided presenting hedonic damage testimony. However, this is one area in which considerable attention, both in forensic economics journals and in case law, has been devoted to one special type damage analysis by economists in personal injury and wrongful death litigation. For general coverage of this controversy, see John O. Ward and Thomas R. Ireland (1996). For coverage of court cases, see Thomas R. Ireland, Walter D. Johnson and Paul C. Taylor (1997). Many statements made in this paper should be qualified by the phrase, "except with respect to hedonic damages." However, since that topic has been adequately developed elsewhere and introduces complex issues not of focus in other aspects of this paper and since hedonic damage testimony is only introduced in a very small percentage of personal injury and wrongful death litigation, this topic will not be discussed further in this paper.
2. In a strict sense, a damage calculation is not the only type of damage analysis an economic expert might provide. In some types of cases, the role of an economic expert may be to determine whether, in fact, any damage has occurred. This is clearly a different matter from proving liability for the damage, if the damage exists, so such determinations are part of damage analysis and yet not part of the types of damage calculation methods being considered in this paper. Damage analysis of this type may occur in antitrust cases and in commercial damages litigation. In most personal injury and wrongful death cases, however, the economic expert begins with the assumption that damage has occurred and the economist's analysis is focused on measuring the amount of the damage, rather than determining whether damage exists.
3. In wrongful death litigation, the post harm scenario can be known with certainty. A dead person will earn no future income and provide no services. In litigation involving a comatose or severely brain damaged person, the post harm scenario can also be known with near certainty.
4. The current Rule 702 is worded as follows in regular text, with changes proposed in the *Report of the Advisory Committee on Evidence Rules*. May 1, 1998, added in italics:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *provided that (1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is a product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*
5. This is not a problem with causation analysis that economists might also perform. *Daubert* tests can be applied to the work of economists that relates to liability in a way that is similar to other sciences that are involved in liability determination and pose no special issues of the sort considered in this paper. For example, if an economist has performed a statistical test to determine the probability that age discrimination has occurred, there is a literature that can be reviewed to determine if the test is generally accepted by other economists doing similar statistical work. The test used is likely to have been based on theory that has been subject to peer review and publication. The theory that it is a good test will have been tested. And there will be a known error rate whose acceptability can be determined. For this type of work there is little difference between statistical tests that would be used to determine whether age discrimination has occurred and epidemiological tests that would be performed to see if the drug Bendectin was the cause of birth defects, as in the *Daubert* decision.
6. *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence*, August 1998, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of U.S. Courts, Washington, D.C. 20544. This document can be downloaded at www.uscourts.gov.
7. *Norfolk & Western R. Co. v. Liepelt* (1980).
8. See Thomas R. Ireland (1992) and Lawrence M. Spizman (1995).
9. This author would regard at least 25% as being a substantial part of an expert's practice. Emphasis should be placed on the testimonial aspect of a consultant's practice. An expert who always testifies for plaintiffs might be very helpful as a unnamed consultant for the defense. Since the expert regularly testifies for plaintiffs, the expert would have been able to observe

what kinds of challenges work and do not work. Providing that knowledge to a defense attorney in a case would be very helpful, but only if the expert is not named as an opposing expert. If a plaintiff oriented expert is named by a defendant, that expert's previous opinions could be discovered and presented in court by the plaintiff in such a way as to support the testimony of the plaintiff's own economic expert. If, however, the expert is named and presented for testimony by both sides of the bar, both sides would be able to check the expert's record in previous cases to insure that the expert uses the same methods on both sides of the bar.

10. 43 F.3d 1311, 1317 (9th Cir. 1995). The 1993 U.S. Supreme Court decision sent the *Daubert* case back to the 9th Circuit for rehearing. This was the decision that was reached on rehearing.

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Liability in Litigation Support and Courtroom Testimony: Is It Time to Rethink the Risks?

Introduction

Expert witness testimony is commonplace in our judicial system. Prosecutors and defense attorneys routinely call upon experts to provide testimony that supports their respective theories. Litigation support services are being offered in nearly every professional field, including finance, economics (<http://nafe.net>) and accounting, and the growing trend is continuing, both nationally and internationally (Banks 1991).

The onslaught of mergers and acquisitions and the willingness of the federal government to litigate anticompetitive behavior has

*Mary Virginia Moore, Assistant Professor of Business Law, Southeast Missouri State University, Cape Girardeau, Missouri

Gary G. Johnson, Professor of Accounting, Southeast Missouri State University, Cape Girardeau, Missouri

Deborah F. Beard, Associate Professor of Accounting, Southeast Missouri State University, Cape Girardeau, Missouri

Moore, Johnson and Beard: *Liability in Litigation Support and Courtroom testimony: Is It Time to Rethink the Risks?*